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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 216

FRED T. MACKEY, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY MEMORANDUM

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N. W.,
Washington, D. C. 20006,
Counsel for the Petitioner.

EDWARD B. STROH,
ROBERT J. DOWNING,
105 South LaSalle Street,
Chicago, Illinois 60603,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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It is of course entirely understandable that the prosecution should wish to insulate from scrutiny the present record, which so notably fails to follow the guidelines that this Court drew in *Holland* v. *United States,* 348 U. S. 121, a record that in particular ignores this Court's insistence on the strict enforcement, in net worth tax prosecutions as in all other prosecutions, of the basic principle that the Government must establish every element of the offense

charged, and that, until it does, the defendant need not come forward to supply evidence.

What is less understandable—indeed it is regrettable in the extreme—is that in seeking to defeat review of the sharp departures from *Holland* that inhere in the ruling below, the prosecution should have gone to such lengths to fudge both facts and law, particularly facts. Its demonstrable obfuscations leave us no alternative but to file the present short reply.

First. In response to the first question raised in the petition (Pet. 2, 10-15), whether the essential condition of an opening net worth had been established with reasonable certainty, the prosecution incorrectly sets forth the record and incorrectly states the law.

A. The prosecution's effort to distinguish the cases from five other circuits on which petitioner relies to establish conflict of decision (Pet. 13-14), on the ground that in the case at bar there was no substantial evidence of cash on hand (Br. Op. 10 and note 3), founders on the present record. Here there was in fact substantial evidence of cash on hand. The prosecution's expert himself recognized (R. 1662-1663) that "the fact that there were currency transactions would indicate that there would be cash on hand over the periods", and the prosecutor in his summing up dwelt heavily on the fact that petitioner had handled many transactions with large sums in currency (R. 1868, 1869, 1874, 1875, 1916, 1917, 1922, 1927).

B. Actually, the prosecution's expert neither testified nor assumed that this petitioner had no cash on hand. The expert's reason for assigning a figure of zero to petitioner's opening cash on hand was not the absence of cash, but only (R. 1661) that "I don't know how much cash he had on hand." The expert admitted that this technique was arbitrary (R. 1659, 1661)—and five circuits and the Court of Claims have condemned it in net worth cases.

Significantly, the prosecution's Brief in Opposition does not refer to this testimony by its expert.

C. The prosecution's reference (Br. Op. 9) to "the exhaustive investigation by the Treasury agents" is demonstrably without foundation. It cites nothing in the record to support that over-enthusiastic generalization, a circumstance perhaps not too surprising, because the record shows the precise contrary. The actual fact, as the prosecution's expert admitted on the stand, is that the Internal Revenue Service had made no effort whatever to determine petitioner's currency on hand, except for the conference at which the latter on the advice of counsel refused to discuss that subject (R. 1661-1662):

> "Q. Aside from the testimony concerning the one conference obtained by the defendant, what other testimony is there of any investigation by the Internal Revenue Service concerning an attempt to determine what the cash on hand was?
>
> "A. I know of none.
>
> "Q. As a matter of fact, aside from that one statement there is no testimony in this record of any investigation by the Internal Revenue Service to determine cash on hand at the starting point, is there, sir?
>
> "A. No, sir."

We cannot take seriously the prosecution's reference (Br. Op. 9) to "petitioner's failure to claim, either during the investigation or at the trial, any undeposited cash on hand at the starting point." For, as the prosecutor said in his opening statement (R. 216-217), and the prosecution's expert admitted on the stand (R. 1662), "it is the responsibility of the Government to establish the starting point." *Accord, Holland* v. *United States,* 348 U. S. 121, 132: "* * * an essential condition in cases of this type is the the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from

which to calculate future increases in the taxpayer's assets." Even in criminal tax cases, it is the responsibility of the prosecution to establish every element of the offense.

D. The prosecution's treatment of the civil cases relied on by petitioner (Pet. 13-15) is revealingly inaccurate.

The prosecution first ignores completely the basic distinction, which as stated in *Holland* v. *United States*, 348 U. S. 121, 126, is that "Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have prima facie validity, the prosecution must always prove the criminal charge beyond a reasonable doubt."

Next, the prosecution says (Br. Op. 11) that "in civil cases it is necessary to determine, as accurately as possible, the exact amounts of the tax deficiencies." The law is exactly to the contrary in deficiency cases. E. g., *Thomas* v. *Commissioner*, 223 F. 2d 83, 88 (C.A. 6), a case twice cited by petitioner (Pet. 13, 14), *per* Stewart, Circ. J.: "Yet, although the petitioners here had the burden of proving that the Commissioner's determinations were wrong, if they did so, *it was not incumbent upon them to prove* that they owed no tax, or *what was the tax that they did owe.*" We have added the italics.

Only in tax refund cases must the taxpayer "prove the facts upon which the correct tax can be determined." *Meyers* v. *United States*, 133 C. Cls. 123, 127, 134 F. Supp. 520, 523. Even there, the "X Equals Zero" formula on which the present conviction rests was flatly rejected, as we have already pointed out (Pet. 13). The prosecution does not even attempt to distinguish that decision, no doubt because it cannot.

Second. In order fully to appreciate the extent to which the prosecution apparently found it necessary to go in order to blur the record on the second question presented, viz., whether the prosecution performed its duty of tracking

down relevant leads, a few words are necessary to place that issue in its setting.

A. As the court below said (Pet. App. A3), the main issue at the trial was whether the excess of $4000 cash per week came from petitioner's policy wheel operation or whether it came from unrecorded and unreported premium income earned by the Gibraltar companies.

Gibraltar Industrial's treasurer, Mrs. Benford, testified on direct examination that the company received premium income which was not recorded on its books (R. 783-784, 787-788, 808-810), which on cross-examination she estimated to range from $2500 and $3300 a week in 1949 to $7000 or $8000 a week in 1959 and 1960 (R. 1227-1229). Passing the point that this testimony was later corroborated by two other prosecution witnesses (Pet. 9), the incident significant here is that, after Mrs. Benford had so testified, the prosecution called for the production of all of the company's records dealing with insurance policy applications (R. 1264):

> "Mr. McNelis [the prosecutor]: * * * I would like to have those records produced in connection with the trial of this case.
>
> * * * * * *
>
> "The Court: We are talking about the policy applications, are we?
>
> "Mr. McNelis: Yes, your Honor, the so-called debit books that we have just been discussing in the last few minutes.
>
> "The Court: Very well.
>
> "Mr. McNelis: I would like to have them produced for Thursday morning.
>
> * * * * * *
>
> "The Court: The records will be produced, any records that you have, no later than nine o'clock Thursday morning. You will take them to the Clerk's Office. * * *"

On the next court day, January 2, 1964, those records, in 16 boxes weighing 830 pounds in the aggregate, were accordingly produced (R. 1289-1291), and they remained available to the prosecution in the Clerk's Office until after the prosecution rested on January 15 (R. 1795; R. 7, entry for 1-17-64).

The record further shows that, at pretrial conferences, the prosecution had never specifically asked for the insurance applications in question although they were discussed (R. 1274-1275, 1290-1291).

B. Here is how the prosecution now treats this incident (Br. Op. 12):

> "The *petitioner's* belated production of the policy applications[4] came much too late * * *." [Italics supplied.]

Footnote 4, after saying that "it became apparent that the companies were in possession of these policy applications", concludes with "The court then ordered their production."

And the text concludes by asserting that the *Holland* case refers to leads furnished to the Treasury agents, "not to possibilities *suggested to the prosecutor* near the close of the trial". [Italics once more supplied.]

We submit it would be difficult for even the most gifted clairvoyant to gather from these quotations from page 12 of the Brief in Opposition—or indeed from anything else in that entire document—that it was the prosecution that had demanded the production of the records in question; that the court's order was issued, not *sua sponte,* but simply responsive to that demand; or that the records were produced, not by the petitioner, but by a third party, Gibraltar Industrial.

We cannot forbear to mention that the prosecution must entertain grave doubts of its legal position when it goes to

such obvious lengths to avoid disclosing to this Court, or for that matter to any reader of its Brief in Opposition, that it had itself called for the production of the records in question—and that after two weeks' opportunity to examine them, it had refrained from introducing them in evidence.

C. While the *Holland* case does indeed speak of the Government's duty to run down leads furnished by the taxpayer (348 U. S. at 135-136), we do not understand its holding to absolve the Government from the duty making full disclosure of leads it has itself uncovered and then obtained pursuant to its subpoena power. Surely if the Government's "interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done" (*Berger* v. *United States*, 295 U. S. 78, 88), and we are not aware that this standard has been in any respect whittled away in the thirty years since it was there formulated, the Government's obligation to track down leads exists regardless of their source—particularly after those leads have been tracked down and it has untrammeled access to the evidence.

Nor can the prosecution excuse its failure to produce the records it had acquired here because (Br. Op. 12, note 5) it would or might "take two or three months to put them back together." For one thing, it was neither a revenue agent nor the prosecutor who so stated; the quotation is from the testimony of Gibraltar Industrial's Executive Secretary (R. 1314), who was estimating, not how long it would take Government officers to examine the records, but how long it would take the company to rearrange them after they were returned.

But even if a proper examination of relevant records freely available to the prosecution might take several months, it should not be overlooked that petitioner's time is also involved. At this moment he is under a five year sentence (R. 66-70), in consequence, certainly in substantial

consequence, of the prosecution's failure to make known to the trier of the facts how the records in question bore on the principal issue at the trial.

Third. Eleven years ago, this Court in *Holland* cautioned prosecutors as well as courts concerning the dangers inherent in net worth prosecutions, and laid down carefully fashioned safeguards in order that those dangers might be avoided. Now the Court's safeguards are being ignored.

Specifically, this Court said (348 U. S. at 138-139; our italics) that "*Once the Government has established its case,* the defendant remains quiet at his peril." But here the court below has transformed this concept to mean that a defendant remains quiet at his peril at any time, even when all that appears (Pet. App. A12) is that the prosecution has "failed to uncover evidence of cash on hand." That is to say, when the Government is unable to establish its case, its failure to do so requires the defendant to come forward at his peril to supply the missing evidence. In short, under the holding below, the defendant must prove his innocence whenever the prosecution is otherwise unable to establish its case.

We believe, therefore, that the time has come, not for a new look at the net worth method in criminal cases—that is not necessary, the *Holland* standards afford ample guidance and protection—but for another look, the first since the date of that decision, to insure that its standards shall be respected. Here they have not been; here the court below accepted in a criminal case the assumption that, because the prosecution was unable to establish the amount of cash that the defendant had on hand at the opening, it follows that he had no cash on hand at all, an assumption that it considered confirmed when he would not come forward to supply the prosecution with the actual figure.

This is, of course, not only an erroneous assumption, but, as the prosecution's own witness admitted (R. 1659,

1661), an arbitrary one. It is moreover an assumption that four circuits and the Court of Claims have rejected in civil cases (Pet. 13-14), where the burden of proof is on the taxpayer, and where the presumption, quite unlike that obtaining in criminal prosecutions, is that the taxpayer owes more tax than he reported in his return.

Accordingly, for the foregoing additional reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N. W.,
Washington, D. C. 20006,
Counsel for the Petitioner.

EDWARD B. STROH,
ROBERT J. DOWNING,
105 South LaSalle Street,
Chicago, Illinois 60603,
Of Counsel.

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